# Belgium

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## 1. Overview

### *1.1. With respect to Privacy*

Article 22 of the Belgian Constitution reads as follows:

> 'Everyone has the right to respect of his private and his family live, save in those cases and under those conditions as determined by law.'

The right to privacy became a constitutional right in the course of the Belgian constitutional reforms of 1994. Before that time, the right to privacy was maintained under reference to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 of the International Covenant on Civil and Political Rights.

The general legal framework with respect to privacy has been set out in the Law of 8 December 1992 on the protection of privacy in relation to the processing of personal data (hereinafter: 'Privacy Law')[1], which is an implementation of Directive 95/46/EC[2]. This law provided for an independent authority ensuring the protection of privacy, which is the Commission for the Protection of Privacy (hereinafter 'Privacy Commission').

### *1.2. With respect to Tax Law*

Article 170 of the Constitution provides one of the main fundamental principles of Belgian tax law, i.e. that '*No tax can be levied for the benefit of the State than by law',* also referred to as the '*principle of legality of taxes*'.

It follows from this principle that, unless explicitly provided otherwise by law, all property, actions, transactions etc. are deemed to be free from tax. Therefore, the burden of proof with respect to taxes lies with the taxing authorities[3].

The Belgian tax system is a declarative tax system, i.e. based on self-assessments via tax returns as filed by the taxpayer[4]. The Belgian Federal Public

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1 Wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens, Belgian State Gazette (G.S.) (Belgisch Staatsblad/Moniteur belge), 18 March 1993, p. 5801.

2 Official Journal L 281 of 23 November 1995, p. 0031-0050.

3 The burden of proof in tax matters is not explicitly regulated in the Belgian tax codes. However, the general principle of auctori incumbit probatio which applies in civil law (Article 1315 of the Belgian Civil Code) also finds application in tax law. This also follows implicitly from a provision contained in various tax codes which states that to establish that tax is due and the relevant amount, the tax administration may have recourse to all methods of proof allowed before courts, save the oath. The Supreme Court has confirmed that the burden of proof lies with the tax administration (Cass. 17 April 1989, Pas. 1989, I, p. 849).

Service of Finances[5] (hereinafter also, the 'tax administration') therefore in essence derives most of the information it requires from the taxpayers directly.

As a counterbalance, the tax administration is granted investigative powers to verify income as declared and to investigate the taxpayer's affairs. These investigative rights of the tax administration are limited in three fundamental ways. Firstly, the investigative powers granted to the tax authorities are set out in the Belgian Income Tax Code 1992 (Wetboek Inkomstenbelastingen 1992, hereinafter 'BITC') and are to be interpreted restrictively. Secondly, when applying its investigative powers the tax authorities must take into consideration the taxpayer's fundamental rights, including but not limited to the taxpayer's right to *respect for his private and his family life*. Finally, the tax authorities are bound by the Privacy Law when dealing with a taxpayer and the taxpayer's personal information.

## 2. Collection of Data

### *2.1. Overview of information collected*

#### *2.1.1. Tax Declarations*

All persons subject to Belgian income tax must annually declare their income on a tax declaration form issued by the Belgian Federal Public Service of Finance[6]. However, a large number of taxpayers whose income is sufficiently known to the tax administration, mainly pensioners and people on benefits, receive a proposal for simplified tax declaration which, if they agree with the tax as calculated in the proposal, relieves them from a further tax declaration[7].

Since 2003 the Belgian tax code provides for the possibility to file a tax declaration online (tax-on-web), which is for all intents and purposes fully equated with the traditional tax declaration[8].

The Belgian tax code prescribes the taxpayer to divulge two specific elements in its tax declaration. Firstly, persons subject to personal income tax must declare if and where at any time during the tax year they hold or have held an account with a

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4 For purposes of this text we have focussed on income tax levied at the Belgian federal level, nevertheless, also VAT, registration duties, inheritance taxes and local and regional taxes are mostly levied on a declarative basis.

5 Belgium is a federal state and although state subdivisions and local authorities have certain taxing rights including specific taxes, income tax remains largely a federal tax (whereby cities and communes levy and additional surcharge as a percentage of the income tax due).

6 Article 305 BITC.

7 For tax year 2011 some 725,000 Belgians received a proposition of simplified tax declaration. See: http://www.minfin.fgov.be/portail2/nl/themes/declaration/new/725000.htm (visited February 13, 2012).

8 Article 307bis BITC.

foreign bank, credit, exchange or savings institution. Secondly, all Belgian companies and Belgian permanent establishments must declare payments made, either directly or indirectly, to an entity established in a country that does not apply the OECD transparency and exchange of information standard or which is established in a country that levies no taxes or has a nominal corporate income tax rate below 10% if the total of such payments made equals or exceeds EUR 100,000[9].

A tax declaration, which is correctly completed and filed by the taxpayer is presumed to be correct and the tax administration will base its tax assessment on the data as declared, unless the tax administration finds the tax declaration to be incorrect, for which it bears the burden of proof[10].

### *2.1.2. Tax Audits*

#### *2.1.2.1. At the level of the taxpayer under review*

Request for information: At a first level all taxpayers subject to income tax may be requested to respond to questions of the tax administration, either orally or in writing. When the taxpayer is requested to respond in writing he must do so within a month[11].

Furthermore, the taxpayer is obliged to present to the Belgian tax administration, all books and documents '*necessary*' to determine the taxes due by that taxpayer. These documents comprise all documents required to be held by law, the accounting documents or any other documents that the taxpayer may deem relevant to determine the taxable income. The taxpayer cannot invoke the confidentiality of these documents in order to refuse to have these documents inspected, unless the taxpayer invokes professional secrecy rules[12]. For corporate taxpayers, the tax code specifically provides that the above information obligation extends to their register of registered share- and bondholders as well as the attendance lists of the meeting of shareholders[13].

The tax administration cannot, however, investigate documents of a private nature, such as private correspondence or relating to private bank accounts[14]. Documents with respect to professional bank accounts can nevertheless be inspected by the tax administration. If an account is used both for private and professional use, it no longer qualifies as private and all relevant documentation pertaining to this bank account may therefore be verified by the tax administration.

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9 Article 307, §1 BITC.

10 Article 339 BITC.

11 Article 316 BITC.

12 Article 334 BITC (see also the section special relationship further down in the text).

13 Article 315 BITC.

14 As confirmed in the administrative guidelines to the BITC (hereinafter referred to as **Com.IB**) No. 315/6 Com.IB.

The tax code specifically provides that books and documents with respect to foreign bank accounts of private individuals, which need to be disclosed in the income tax declaration, need to be retained and, if requested, be presented to the tax administration The legality of this rule is questionable in the absence of a similar rule for Belgian (private) bank accounts in light of the both Belgian constitutional law and the freedom of services under EU law.

It is important to note that, as a rule, the tax administration cannot request the taxpayer to submit the documents to the tax administration or to provide the tax administration with copies of the relevant documents. Therefore, in principle, unless the taxpayer explicitly agrees to bring the requested documents to the tax administration, the tax administration must go to the relevant taxpayer in order to inspect the relevant documents. In practice, the taxpayer is often invited to come to the offices of the tax administration, which he can, however, rightfully refuse to do.

Visitation right: It follows from the limitations of the request for information that, the BITC also provides the possibility for the tax administration to perform an inspection at the premises of the taxpayer. In practice, such an inspection often follows when the taxpayer refuses to provide the information requested to the tax administration or to submit the requested documentation.

The BITC provides that the officials of the tax administration have to be granted free access to all rooms (deemed to be) used for professional purposes by the taxpayer during all hours that there is professional activity. The goal of these on-site visits is strictly described in the BITC as, on the one hand, to verify the activities performed and their importance, the nature and quantity of supplies and material and, on the other hand, to investigate the books and documents of the taxpayer. The visitation right is to be interpreted strictly, i.e. the visitation right cannot be used for any other activity than those listed in the BITC.

The tax administration, in principle, has no access to the private home(s) of a taxpayer, where the taxpayer's privacy is in principle protected. The BITC therefore provides a double protection, i.e. an officials of the tax administration may only be granted access to private rooms between 5am and 9pm and only when he is duly authorized to do so by the relevant magistrate. In order to obtain the required authorization the tax official must first petition the court for approval and this with the consent of his superior officer within the tax administration[15]. Moreover, this authorization is only an administrative formality before the visitation right can be exercised; it is, however, not a court order. Therefore, to the extent that the taxpayer would refuse access to the tax official, the court authorization cannot be 'enforced' and the tax official can only impose administrative sanctions (tax increases and fines).

The visitation right provided by the BITC must therefore also be clearly distinguished from the procedure of a house search conducted with a search warrant and

15 Article 319 BITC.

as provided for under criminal law. Finally, as a last limitation, tax officials may only 'look' when exercising their visitation right, i.e. they may not review the contents of cabinets, desks or drawers, etc. Tax officials that would not respect the limitations of their visitation right will conduct an invalid house search and all information obtained is to be considered null and void.

Investigations on the premises of the taxpayer in principle need not to be announced in advance, although in practice they often are.

#### *2.1.2.2. Collateral use of the data collected*

Article 317 BITC provides that the use of information obtained by the tax administration, either in the context of a request or a visitation, is not restricted to that particular taxpayer from which the information is obtained, but may also be used in order to levy taxes in the hands of other taxpayers, e.g. its suppliers or customers. However, the use of the information obtained must in first instance be directed for the taxation of the taxpayer under investigation. Therefore, the tax administration may in principle not request a taxpayer to provide information, look into his books or perform an on-site tax inspection the primary purpose of which would be the taxation of another taxpayer[16].

However, the BITC does provide investigative powers with respect to third parties under specific circumstances, which are discussed in more detail in the following section.

#### *2.1.2.3. Powers of investigation with respect to third parties*

In order to ensure the correct levy of taxes the tax administration can also request the collaboration of third parties. This obligation to collaborate with the tax administration covers individuals, companies and associations. Article 322 BITC provides that the tax administration may request "*all information it deems necessary to establish the correct levy of taxes*". Although the scope of the provision is very broad, it is generally accepted, however, that this provision does not allow so-called "fishing expeditions". Third parties requested to provide information must have a link to a certain taxpayer. However, a professional relationship (e.g. customer, supplier, creditor) with the taxpayer under investigation is not required. Moreover, the requested information should bear relevance for tax purposes[17].

The information is usually obtained via a request for information, to which the third party may be requested to respond orally or in writing. In the latter case the tax administration may also request that certain documents are submitted by the third party. However, the tax administration does not have the right to investigate

16 M. De Jonckheere (ed.), *De fiscale procedure*, (Brugge: Die Keure, 2010) p.73.

17 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005) p. 225.

the requested party's books and documents. The requested party can refuse to collaborate, e.g. because the information requested is not tax relevant. However, if no or incorrect or insufficient information is provided, the tax administration may decide to proceed with hearing the third party at the offices of the tax administration[18], subject to strict procedural rules[19] which, when not respected, may result in the inadmissibility of the information obtained. As a rule, the taxpayer under investigation is invited to attend the interview and also has the right to ask question (via the tax official) to the third party being interviewed.

However, a 'fishing expedition' with third parties is, within certain limits, possible under Article 323 BITC, which provides the tax administration with the possibility to request information from third parties regarding certain transactions or activities, with respect to an unspecified (group of) taxpayer(s). Contrary to the procedure discussed above, a specific relationship is required here as the transactions or activities must be related to the requested party's professional activities[20].

For requests at the level of banks or third parties subject to professional secrecy rules (see also further below).

### *2.1.3. Specific information obligations*

Despite the fact that the tax administration in first instance relies on the information as provided by the taxpayer, the Belgian tax administration already has information at hand with respect to a number of categories of income before a tax declaration is made. Various specific information obligations have been put in place, a.o.:

- All deeds with respect to the transfer of Belgian real estate as well as rental agreements are subject to registration in state registers[21];
- All employers are required file tax forms with respect to all wages, remunerations and benefits in kind paid to employees;
- Financial institutions and insurance companies are obliged to communicate the balance of a deceased's assets to the tax administration[22];
- Legislation with respect to the prevention of money laundering and terrorist financing[23] provides for a notification system which, among other things, applies to financial institutions, lawyers, notaries, tax consultants and auditors, which must all notify suspicious transactions that might in-

18 No. 322/15 Com.IB.
19 Articles 325 & 326 BITC.
20 A classic example is the car dealer who is requested who has bought cars within a given period of time.
21 Article 433 BITC.
22 Article 97 of the Inheritance Tax Code (Wetboek van Successierechten).
23 Law of 11 January 1999, S.G. 9 February 1999.

dicate money laundering or terrorist financing to the Belgian Financial Intelligence Processing Unit[24].

## 3. Special Relationships

### *3.1. Banks*

Belgium, until fairly recently, remained one of ever fewer jurisdictions that did not partake in the exchange of bank data. The Belgian tax administration took the view that Belgium's domestic provisions with respect bank secrecy did not allow them to investigate the Belgian accounts of non-residents. In March 2009 this approach to the exchange of bank data earned Belgium a (brief) spot on the OECD grey list of tax havens. As a result, Belgium has thoroughly adapted its position with respect to exchange of information and has modified its bank secrecy rule[25].

From the perspective of the Banks, it should be made clear that what is often referred to as Belgian bank secrecy is in essence a bank discretion rule. Unlike some other jurisdictions, notably Luxembourg, Belgium does not have a strict bank secrecy rule, but rather an obligation of discretion in the contractual relationship between a bank and its client. Therefore, a bank, in principle, may not answer requests for information by the Belgian tax administration with respect to a client and can be held liable for damages in civil procedures if it divulges information in breach of this principle.

As much was confirmed in a 1978 decision of the Belgian Supreme Court which held that the discretion principle was not sanctioned under the professional secrecy rule of Article 458 of the Criminal Code which applies to various professions (see also further below)[26]. Therefore, although the tax administration as a matter of administrative practice already accepted that banks were bound by discretion obligations (mainly with the prevention of capital flight from Belgium as an argument) the legislator deemed it appropriate, in reaction to the above case lawo f the Supreme Court, to formally introduce the principle and its boundaries in the BITC by Law of 8 August 1980.

Article 318 BITC states that the tax administration is not allowed to gather information from the accounts, books and documents of banks, exchange-, credit- and savings institutions (hereinafter commonly referred to as "bank(s)"), for the taxation of their clients. Article 318 BITC thereby envisages the situation of a tax audit at the level of the bank and states explicitly that the information obtained in

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24 http://www.ctif-cfi.be/website/index.php?lang=en. .

25 The Belgian bank secrecy rule was amended by the Law of 14 April 2011, S.G. 6 May 2011 and further fine-tuned by the Law of 7 November 2011, S.G. 10 November 2011 and the Law of 28 December 2011, S.G. 30 December 2011.

26 Cass. 25 October 1978, JT 1979, p. 371. (Please note that, as explained above, Banks can, however, be held liable in civil procedures for divulging information in breach of their obligation of discretion.)

the course of such an audit may, as a rule, not be used for the taxation of the bank's clients. However, such information may nevertheless be used against the bank's clients if, and only if, the audit brings to light certain indications for the existence, or the preparation of, tax evasion.

Until the recent amendments to Article 318 BITC, it had always been accepted that, as a matter of principle, the tax administration could not circumvent the above rule by requesting banks directly about the transactions and services they perform for their clients (i.e. by using the procedure of Article 323 BITC as discussed above)[27].

However, recently two new points of entry to bank information exist for the Belgian tax administration which are laid down in Article 322 BITC.

The tax administration may, under certain conditions, obtain certain information from the banks if the tax administration has one or several 'indications' of tax evasion or when it has the 'intention' to make use of the procedure of taxation according to 'certain signs and indications' provided by Article 341 BITC. The latter procedure allows the tax administration to proceed with a tax assessment based on "indications" i.e. generally the fact that the taxpayer's way and standard of life manifestly exceeds his income as declared.

It follows from the use of the words 'indication' of tax evasion and 'intention' to use the procedure of Article 341 BITC that tax evasion need not be proven and that the procedure of Article 341 BITC may in the end not effectively be used for the tax administration to request access to certain data. Although according to some commentators this provides too much leeway to the tax administration[28], the legislator has nonetheless had attention for the issue of the taxpayer's privacy: notably, taking into consideration the concerns and recommendations voiced by the Privacy Commission, by introducing strict procedure requirements for the application of Article 322 BITC.

Only tax officials of a certain level, i.e. directors, may authorize a tax official to request information from a financial institution directly and such authorization may only be granted if the tax official has first requested the relevant information from the taxpayer (i.e. following the procedure of request for information as discussed above.), hereby clearly indicating to the taxpayer which specific information is required and including an express warning that if the taxpayer is not forthcoming, Article 322 BITC may be enforced by the tax authorities, i.e. that the information will be requested from the taxpayer's bank. If information is subsequently

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27 See Com IB No. 322/7 confirmed also in doctrine: W. Dierick, *De fiscus en het bankgeheim*, A.F.T. 1982, p. 212; R. Henrion, *La concertation et l'autonomie bancaire*, J.T. 1972, p. 293.

28 See e.g. T. Afschrift & P. Stas, 'De opheffing van het bankgeheim in directe belastingen', *Algemeen Fiscaal Tijdschrift*, No. 4 (2012), pp. 11 - 17 (p. 11 et seq.); S. Vanhaelst, *Patrimoine: fiscalité et secret en évolution, Revue Générale de Contentieux Fiscale*., No. 4 (2011), pp. 269 - 285 (p. 272 et seq)

requested from the bank at a later stage, this information so requested must be restricted to the information as requested directly from the taxpayer. Moreover, the required authorization is conditional upon the tax official having established that there is either an indication of tax evasion or that investigations leads to a potential application of the procedure of taxation according to signs and indications, which effectively obliges the tax official to motivate the authorization request as such blocking of unjustified requests. Finally, if information is requested from the bank under the above conditions, the taxpayer is immediately informed thereof.

Finally, there are some further limitations to the scope of the Belgian banking discretion rule. First of all, Article 318 BITC only applies with respect to direct taxes and only in the context of the assessment of taxes. As a result, Article 318 BITC does not apply when the tax administration, after having assessed taxes, proceeds with the collection thereof[29]. Furthermore, Article 318 BITC does not apply with respect to the exchange of information under the Savings Directive and does not prevent the communication of information by banks required under anti-money laundering legislation.

### *3.2. Lawyers – Tax Advisors*

Any information received by a lawyer in the exercise of his profession, orally or in writing, electronically or on paper, is confidential and subject to professional secrecy. The disclosure of such information to other persons and organizations is, as a general rule, not allowed. It is generally accepted that this confidentiality obligation not only applies to the lawyer, but equally applies to his staff and trainees.[30] As a result, a lawyer is obliged to refrain from disclosing information on his clients to the tax authorities. In principle, the tax authorities are thus not allowed to request a lawyer for information in relation to his clients. It should be noted, however, that the rules on professional secrecy only aim to protect the interests of the client, and not those of the lawyer. Consequently, the rules on professional secrecy do not preclude the tax authorities making inquiries in relation to the lawyer's own tax affairs. A lawyer, being subject to such inquiries, is nonetheless obliged to refrain from disclosing any information in relation to the (identity) of his clients at the occasion thereof.[31]

The confidentiality obligation is not absolute and subject to exceptions. First of all, a lawyer cannot refuse to disclose information on his clients if a specific legal provision obliges him to do so. Several statutes indeed oblige lawyers (and other persons subject to professional secrecy) to disclose certain information on their clients. The law of 11 January 1993 on prevention of the use of the financial system

29 Article 319bis BITC.

30 For case law see a.o. Brussels, 23 October 1990, J.T., 1991, no 5597, p. 496; Brussels, 27 November 1981, J.T., 1982, no. 5196, p. 43.

31 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005) p. 239.

for the purpose of money laundering,[32] for instance, obliges several (legal) professions and organizations, including lawyers, to notify 'suspicious' transactions to the Financial Intelligence Processing Unit . The obligation of lawyers to notify certain "suspicious" transactions to the Financial Intelligence Processing Unit is, however, subject several exceptions that are not applicable to other organizations and professions to which that obligation applies. As opposed to other legal professions and organizations subject to the law of 11 January 1993 a lawyer is, for instance, not obliged to notify 'suspicious' transactions if he establishes the legal position of his client or represents his client in judicial proceedings. Secondly, lawyers (and other persons subject to professional secrecy) have the right, not the obligation, to disclose confidential information at the occasion of **judicial** testimony, i.e. testimony before judicial authorities. This exception is thus not applicable to fiscal testimony before the tax authorities within the meaning of Articles 322, 325 and 326 BITC.

The tax authorities are obliged to refer any disagreement with a lawyer on the applicability of the rules on professional secrecy (and the exceptions thereon) to information the latter has in his possession, to the competent disciplinary council (*cf.* Article 334 BITC). The decision of the competent disciplinary council on this matter is binding upon the tax authorities.[33]

Information disclosed to the tax authorities in violation of the confidentiality obligation cannot be used for the assessment of any tax. Information that has been disclosed to the Financial Intelligence Processing Unit cannot, as a general rule, be communicated to other government institutions, including the tax authorities.[34] If serious indications of money laundering are present, the Financial Intelligence Processing Unit is, however, allowed to communicate that information to the Public Prosecutor's Office who in turn is obliged to Minister of Finance thereof provided that certain conditions are fulfilled (*infra* note no. 57).

In accordance with Article 458 of the Criminal Code, any deliberate and premeditated disclosure of information in violation of the confidentiality obligation is subject to criminal penalties. Moreover, any unlawful disclosure of confidential information subject to professional secrecy can give to rise to disciplinary penalties and the payment of compensation for any damages that the client (or a third party) may have incurred.

It is debated whether or not it is possible for a client to give up the confidentiality in his relationship with the lawyer. Since the rules on professional secrecy are considered to be of 'public order', some scholars argue that a client cannot authorize his lawyer to disclose (certain) information subject to professional secrecy to

32 S.G. 9 February 1993. The law of 11 January 1993 has implemented the provision of Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of Money Laundering, OJ L 166, 28.6.1991, pp. 77–82.

33 Comm. IB. No. 334/8.

34 Article 17 of the Law of 11 January 1993 on the prevention of the use of the financial system for the purpose of Money Laundering.

other persons and organizations.[35] The rules on professional secrecy are, however, not applicable to the client who is, as a result, not prohibited from disclosing such information himself.

### *3.3. Other*

Similar rules on professional secrecy, including the exceptions thereon, apply to (chartered) accountants,[36] (certified) tax consultants, auditors,[37] medical staff and other persons who become acquainted to confidential information in the exercise of their profession.[38] (Chartered) accountants, (certified) tax consultants and auditors are, however, subject to a more extensive obligation to notify certain 'suspicious' transactions to the Financial Intelligence Processing Unit (*supra* note no.39).

## 4. Sharing information domestically

### *4.1. Within the tax authorities*

#### *4.1.1. Structure and organization of the FPSF*

The assessment and collection of federal taxes, including the competence to collect data and perform tax audits in that respect, is entrusted to the Federal Public Service of Finances. From an organizational perspective, the Federal Public Service of Finances is divided into six different tax administrations which follow the activity of the taxpayer instead of the nature of the tax: [39] the Administration of Fiscal Affairs (AFZ), the Administration of Entrepreneurial and Income Taxation (AEIT), the Administration of Collection, the Administration of Land Registry and Crown Lands (ALRC), the Administration of Custom and Excise Duties and the Special Tax Inspection (STI). As a result, the competence to assess a particular tax is not necessarily entrusted to a separate tax administration. The AEIT, for instance, is entrusted with the competence to assess and perform tax audits in relation to all income taxes, taxes equivalent to income taxes, VAT and the tax on collective investment vehicles, credit institutions and insurance companies. [40] Moreover, ac-

35 T. Afschrift, 'Le secret professionnel et les obligations fiscales de l'avocat', *Revue Générale de Contentieux Fiscale,* No. 1 (2011) pp. 5 -55 (p. 8)

36 Law of 22 April 1999 with respect to accounting and fiscal professions, S.G. 11 May 1999.

37 Articles 79 and 35 of the law of 22 July 1953 on the creation of the Institute of Auditors and the organization of public supervision on the profession of auditors, coordinated by Royal Decree of 30 April 2007, S.G. 24 May 2007.

38 Article 458 of the Criminal Code.

39 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005) p. 152, m.no.195.

40 Royal Decree of 6 July 1997, S.G. 31 July 1997.

cording to the Act of 8 Augustus 1980, the STI is authorized to perform tax audits in relation to all (federal) taxes ("polyvalent tax administrations").[41] [42]

### *4.1.2. Sharing of information within the FPSF*

Historically, the sharing of information within the Federal Public Service of Finances was considered not be to be allowed. On the basis of the principle of legality, it was argued that the powers of investigation included in the respective tax codes are only available to the tax administration for the objectives the legislator specifically intended, i.e. the assessment of that particular tax at the occasion of a tax audit of a specific taxpayer.[43] As a result, information obtained at the occasion of a tax audit (of a specific taxpayer in relation to a specific tax) could only be used in the context of that tax audit and could not be exchanged to (and used by) other tax administrations in view of assessing other taxes and other government institutions.[44] [45]

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41 Preparatory Works of the Senate, 1979, 5-XXXIII, No. 2, p. 15.

42 The powers of investigation available to the tax administration at the occasion of a tax audit are, however, included in the respective tax codes (the BITC, Inheritance Tax Code (Wetboek Successierechten), the VAT Code (BTW Wetboek), etc.) and, as a result, depend on the type of tax to which the tax audit relates. This implies, for instance that, if a "polyvalent tax administration", such as the STI and AEIT inspects the income tax return of a particular taxpayer, it is not allowed to use the powers of investigation included in tax codes other than the BITC. Information obtained at the occasion of a tax audit conducted by a "polyvalent tax administration" in relation to a particular tax (e.g. income tax) through the powers of investigation included in a different tax code (e.g. the VAT Code) is illegitimate and, as a result, cannot be used in the course of any tax assessment. Having regard to the fact that the powers of investigation included in the respective tax codes are not entirely similar (e.g. bank secrecy), serious discussions may arise between a taxpayer and a "polyvalent tax administration" on the legitimacy of the tax audit conducted by that administration: see for instance Antwerp, 16 March 2006, F.J.F. 2006/84 and Cass., 14 September 2007, www.cass.be, discussed by A. Visschers, Bankgeheim in het Belgisch Fiscaal Recht, Themis, 2009, pp. 58-59.

43 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005) p. 127

44 Cass., 9 January 1936, Rec. Gen. Enr. Not., 1937, 1711. In this landmark case, the Court of Cassation held that the Administration of Land Registry and Crown Lands was not allowed to assess registration duties on the basis of an act revealing a concealed transfer of immovable property, since that act was discovered at the occasion of a tax audit in relation to stamp duties conducted by a different tax administration.

45 As a general rule, the principle of legality also prohibits the tax officer to use the powers of investigation provided by a particular tax code in order to obtain information which is solely relevant for the assessment of a tax regulated by another tax code. This implies, for instance, that the Administration Land Registry and Crown Lands is, as a general rule, not allowed to perform a tax audit solely in order to obtain information which the AEIT has requested for the purposes of assessing income taxes. The law of 20 August 1947, which has provided a legal basis for exchange of information and which will be discussed further below, has introduced provisions which allow the tax officers of the Federal Public Ser-

The law of 20 August 1947 has, however, provided a legal basis for the sharing of information both with other tax administrations and other government institutions. The provisions of the law of 20 August 1947 have subsequently been included in the respective tax codes [46] and have recently been amended by the Programme Law of 23 December 2009.[47] According to preparatory works of the Programme Law of 23 December 2009, these amendments were intended to facilitate the adoption of a "super databank", in which all tax data would be systematically stored and exchanged, in the near future.[48] It is, however, doubtful whether the law of 23 December 2009 indeed constitutes a sufficient legal basis for the adoption of such a "super databank".[49]

The provisions of the law of 20 August 1947, as amended by the programme law of 23 December 2009, provide that information, documents, statements and acts legitimately obtained at the occasion of a tax audit by an officer of the Federal Public Service of Finances, may be used to assess any tax which might be due. In addition, every tax administration of the Federal Public Service of Finances is obliged to *"**place relevant and not excessive information** in their possession at the disposal of all (other) tax officers of the Federal Public Service of Finances to the extent that **those officers are legally instructed with the assessment and collection of taxes** and **that information contributes** to the fulfilment of the mandate of those officers to assess and collect any tax levied by the State"* (authors' translation and emphasis). Consequently, the sharing of information within the Federal Public Service of Finances is admissible ("legitimate") on the condition that (i) that information is relevant, not excessive and contributes to the assessment of any tax levied by the state and (ii) the receiving tax is legally instructed with the assessment and collection of taxes. These conditions, which have been introduced by the Programme Law of 25 November 2009, have been included at the specific request of Privacy Commission in order to ensure that the sharing of information within the

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vice of Finances, within certain limitations, to perform a tax audit through the means of investigations included a particular tax code (e.g. the BITC) in order to assess taxes regulated by a different tax code (e.g. the VAT code). These provisions of the law of 20 August 1947 are, however, not discussed in the present report.

46 Article 336 BITC, article 93quaterdecies of the VAT Code, Article 211 § 2 of the Code on Various Levies and Taxes, Article 210 of the Code on Custom and Excise Duties, Article 289 of Registration Duties Code.

47 S.G. 30 December 2009. The programme law of 23 December 2009 has also increased the possibilities of a particular tax administration to use the powers of investigation included in certain tax code (e.g. the BITC), to perform a tax audit in view of obtaining of information relevant for the assessment of another tax (e.g. registration duties) (see note 48).

48 Parliamentary Question No. 16034 of 10 November 2009, CRABV 52 COM 691, www.dekamer.be.

49 L. De Broe, D. Pieters, P. Schoukens, D. Van Bortel, Opvraging, aanwending en uitwisseling van gegevens (nationaal en internationaal) op vlak van fiscaliteit, sociale zekerheid en justitie door de FOD's Financiën, Justitie, Arbeid en Sociale Zekerheid, (Leuven: KULeuven, 2010), p. 41 – 42.

Federal Public Service of Finances is in conformity with the Privacy Law.[50] The precise content and added value of these conditions is, however, far from clear.[51] In addition, it is generally accepted that the sharing of information within the Federal Public Service of Finances is only legitimate if that information has been legitimately obtained at the occasion of a tax audit, i.e. in conformity with the powers of investigation included in the tax code of the tax to which that tax audit relates.[52]

From the preparatory works of the Programme Law of 23 December 2009 can be derived that - under the conditions set out above - the sharing of information within the Federal Public Service of Finances can take place at the request of another tax administration, spontaneously or systematically.[53]

### *4.2. With other authorities*

#### *4.2.1. General*

The Law of 20 August 1947 not only provided a legal basis for the sharing of information within the Federal Public Service of Finances, but also for the sharing of information with other government institutions. The provisions of 20 August 1947 were subsequently included in the respective federal tax codes, except for the Inheritance Tax Code (Wetboek van Successierechten) and the Code on Taxes equivalent to Income Taxes (Wetboek van de met Inkomstenbelastingen Gelijkgestelde Belastingen).[54] With respect to the latter taxes the Law of 20 August 1947 therefore remains the only legal basis for the sharing of information with other government institutions.

According to the provisions of the Law of 20 August 1947 (as they have been included in the respective tax codes), the government institutions of the State, including the Public Prosecutor's Office, the secretariats of the courts and all jurisdictional bodies, the Communities, the Regions, the provinces, the agglomerations, the communities and the federations of communities and "*public institutions and bodies"*, are, upon request of an officer instructed with the assessment and collection of taxes, obliged to: (i) provide all information which they have in their possession;

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50 Law of 8 December 1992 on the protection of the privacy in relation to personal data processing as amended by the law of 11 December 1998, S.G. 3 February 1999.

51 L. De Broe, D. Pieters, P. Schoukens, and D. Van Bortel, Opvraging, aanwending en uitwisseling van gegevens (nationaal en internationaal) op vlak van fiscaliteit, sociale zekerheid en justitie door de FOD's Financiën, Justitie, Arbeid en Sociale Zekerheid, (Leuven: KULeuven, 2010), p. 19-20; D. Noré and F. Smet, 'Nieuwe regels voor gegevensuitwisseling: een maat voor niets?', *Fiscoloog*, No. 1191 (2010), pp. 6 - 9 (p. 6)

52 See supra footnotes 48 and 50.

53 Parl. Doc., Chamber, 2009-2010, 2278/1, p. 82.

54 Article 327 BITC; article 93 quaterdecies, § 1 of the VAT Code; Article 289 § 1 of the Registration Duties Code (Wetboek Registratierechten), Article 211 § 1 of the Code on Various Taxes and Levies (Wetboek Diverse Rechten en Taksen), Article 210 § 1 of Code on Customs and Excise Duties (Wetboek Douane en Accijzen).

(ii) to deposit for inspection every act, register and any other document which they have in their possession and; (iii) to allow that tax officer to make any inquiry, copy or abstract which that officer deems necessary for the assessment of the taxes levied by the State. *"Public institutions and bodies"* within the meaning of the law of 20 August 1947 are *"institutions, ventures, associations, organizations and services managed by the State, Communities or Regions, guaranteed by the State, Communities or Regions, whose activities are supervised by the State, Communities or Regions or whose management is appointed by the Federal, Community or Regional government, at its recommendation or approval".* From the administrative commentary on the BITC, which contains a non-exhaustive list of institutions which are presumed to be *"government institutions and bodies"* within the meaning of Article 329 BITC,[55] can be derived that *"government institutions and bodies"* include inter alia the Central Social Security Data Bank, the Fund for Occupational Accidents, the Fund for Occupational Diseases, the National Bank, the Authority for Financial Services and Markets, etc.

### *4.2.2. Transfer of information by other authorities to the FPSF*

The transfer of information by aforementioned authorities to the Federal Public Service of Finances is subject to the following conditions. First of all, the sharing of information is only admissible upon request of the Federal Public Service of Finances. This request may relate to one specific taxpayer or a group of taxpayers.[56] A spontaneous or systematic transfer of information to the Federal Public Service of Finances is, however, not allowed. Secondly, from the preparatory works can be derived that its provisions do not constitute an autonomous power of investigation available to the Federal Public Service of Finances.[57] This implies that a request for information of the Federal Public Service of Finances is only admissible to the extent that a preliminary tax audit of a taxpayer or a group of taxpayers has revealed omissions or irregularities which justify the necessity of such a request ("*subsidiarity principle*").[58] Requests of the Federal Public Service of Finances which seek to establish an eternal flow of all existing and future information are contrary to the *"subsidiarity principle"* and, as a result, illegitimate.[59] Lastly, other government

55 Article 329 of the BITC has incorporated the provisions of the Law of 20 August 1947.

56 H. Dubois, 'Vijf regels van fiscaal onderzoek-grondbeginselen van het fiscaal onderzoek en het gebruiken van inlichtingen gevonden door andere administraties of instanties', *Tijdschrift voor Fiscaal Recht* No. 81-82 (1988) pp. 262 - 288 (pp. 270-272)

57 Parl. Doc., Chamber, 1937-1938, 263, p. 3.

58 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005) p. 268; H. Dubois, 'Vijf regels van fiscaal onderzoek-grondbeginselen van het fiscaal onderzoek en het gebruiken van inlichtingen gevonden door andere administraties of instanties*', Tijdschrift voor Fiscaal Recht*., No. 81-82 (1988), pp. 262 - 288 (p. 269).

59 The position of the administrative commentary on Article 327 BITC that "the central tax administration organizes the systematic transfer of certain information which is in the pos-

authorities are only allowed to transfer information to the Federal Public Service of Finances which they have *"in their possession"*. Other government authorities are thus not allowed to proceed to an audit in order to obtain the information which the Federal Public Service of Finances has requested.

### *4.2.3. Transfer of information by the FPSF to other authorities*

According to Article 337 BITC, information obtained by a tax officer in the pursuit of his mandate is subject to professional secrecy.[60] Article 337 BITC, however, also provides that *"the officers of the administration of direct taxes and the administration of Land Registry and Crown Lands act within the pursuit of their mandate when they provide information to other government institutions of the State, including the public prosecutor's office, the secretariats of the courts and other jurisdictional bodies, the Communities, the Regions and other public institutions and bodies."* (authors' translation). The transfer of information by the tax administrations of the Federal Public Service of Finances to other government authorities is therefore, as a general rule, admissible. From the preparatory works it can be derived that the provisions on professional secrecy were intended to remove every obstacle to an efficient cooperation between the Federal Public Service of Finances and other government institutions.[61] It is therefore generally accepted that the transfer of information by the Federal Public Service of Finances to other public institutions can take place both upon request of those authorities and spontaneously. The Federal Public Service of Finances cannot, however, perform a tax audit solely in view of obtaining information which those authorities have requested.[62]

Information received by *"public institutions and bodies"* from the Federal Public Service of Finances is subject to professional secrecy and cannot be used for other purposes than the execution of the legal provisions for which that information has been provided (Article 337 (4) BITC).

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session of other government institutions" (authors' translation), should therefore be rejected (Comm. IB No. 327/23).

60 Article 337 BITC has incorporated the provisions of the Law of 20 August 1947 with respect to income taxes. Similar provisions have been included in the other federal tax codes: Article 93bis of the VAT Code, Article 212 of the Code on Various Levies and Duties, Article 164bis of the Inheritance Tax Code; Article 236bis of the Registration Duties Code and Article 320 of the Code on Customs and Excise Duties.

61 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005) p. 138; Parl. Doc., Chamber, 1993-1994, 1421/1, 10; Parl. Doc., Senate, 1992-93, 657/2, 11; Parl. Doc., Senate 1977-78, 415/1, 34 and 415/2, 74, Parl. Doc., Chamber, 1975-1976, 879/1, 35

62 See Court of First Instance of Ghent, 21 October 2009, unpublished, discussed by D. Noré and F. Smet, "Nieuwe regels voor gegevensuitwisseling: een maat voor niets?", *Fiscoloog*, No. 1191 (2010), , pp. 6 - 9 (p. 6 - 7).

#### *4.2.4. Special considerations regarding the sharing of information with the Public Prosecutor's Office*

##### *4.2.4.1. Transfer of information by the Public Prosecutor's Office to the FPSF*

According to the provisions of the Law of 20 August 1947 (as they have been subsequently included in the respective tax codes), the inspection of acts, documents, registers of *"judicial proceedings"* is subject to the prior and express authorization of the public prosecutor, the attorney-general or the chief public prosecutor.[63] [64] [65] Consequently, the Federal Public Service of Finances only has access to the criminal file (of a taxpayer) after having obtained the authorization of the public prosecutor, the attorney-general or the chief public prosecutor. The grant or refusal of a request for access to the criminal file depends on the entire discretion of the Public Prosecutor's Office, who is free the limit the access to certain parts of the criminal file.[66] A decision which (partially) refuses the request is not open for appeal.[67] The burden of proof that such a prior authorization has been obtained lies with the requesting government authority (the Federal Public Service of Finances).[68]

Information from a criminal file - obtained with the express and prior authorization of the Public Prosecutor's Office - may be used by the Federal Public Service of Finances in order to assess any tax. Such information is subject to the provisions of professional secrecy of tax officers discussed above (*supra* notes nos. 16 and 17). The taxpayer to which that information relates has a right to claim access to that information obtained by the Federal Public Service of Finances, in accordance with the provisions of the 11 April 1994 on the publicity of government documents.[69]

According to Article 2 of the Law of 28 April 1999, the officers of the Public Prosecutor's Office attached to a court or tribunal at which criminal proceedings are pending are obliged to inform the Minister of Finance if an inquiry in criminal matters has revealed indications of fraud in relation to direct and indirect taxes.[70] [71]

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63 See (inter alia ) Article 327 BITC.

64 The notion of "judicial proceedings" refers not only to criminal proceedings, but also to civil proceedings and disciplinary proceedings (see Parl. Doc., Chamber, 1937-1938, 263, 3)

65 According to some court decisions, this authorization can also be granted by a different magistrate of the Public Prosecutor's Office than the ones expressly mentioned by the Law of 20 August 1947: Brussels, 21 October 1998, J.D.F., 1998, 242; Gent, 16 October 1997, F.J.F., 1998, p. 126, Antwerp, 14 May 1996, F.J.F., 1997, p. 31.

66 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005), p. 286, m.no. 408.

67 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005), pp. 281 – 286.

68 Cass., 24 November 1964, Rev.Fisc., 1965, p. 215; Brussels, 23 October 1968, Rev.Fisc., 1969, p. 121.

69 Council of State, 28 March 2001, J.T. 2002, p. 236; Council of State, 27 June 2001, F.J.F., 2003, p. 342; Antwerp, 12 March 2001, F.J.F., 2001, p. 231.

70 Article 2 of the Law of 28 April 1999, S.G. 25 June 1999.

Article 2 of the Law of 28 April 1999 has to be interpreted strictly and only obliges the Public Prosecutor's Office to inform the Minister of Finance of the existence of tax fraud mechanism. If the Federal Public Service of Finances wants to have access to the criminal file of the taxpayer itself, it should obtain the prior and express authorization of the Public Prosecution's Office as discussed above (*supra* notes no. 55 and 56).

It is generally accepted that the Federal Public Service of Finances may act as a plaintiff claiming damages in criminal proceedings in order to receive compensation for damages which cannot be compensated through the provisions of tax law. Consequently, the Federal Public Service of Finances is not allowed to act as a plaintiff claiming damages solely in order to collect (evaded) taxes.[72] As a plaintiff claiming damages the Federal Public Service of Finances is allowed to request the examining magistrate for access to certain parts of the criminal file (Article 61*ter* of the Code on Criminal Proceedings). The information so obtained may only be used by the plaintiff claiming damages *"in the interest of his defence"*.[73] Although the Federal Public Service of Finances is not allowed to act as a plaintiff claiming damages solely in order to collect the evaded tax, it is argued in legal doctrine that the FPSF is not precluded to use information obtained through Article 61ter of the Code on Criminal Proceedings, in order to assess any tax which might be due.[74]

#### *4.2.4.2. Transfer of information by the FPSF to the Public Prosecutor's Office*

The exclusive competence in relation to criminal inquiries and prosecutions is vested in the Public Prosecutor's Office. The role of the officers of the Federal Public Service of Finances in that respect is limited to the notification to the Public Prosecutor's Office of any criminal offence of which they become acquainted in the course of the fulfilment of their mandate (Article 29 § 1 of the Code on Criminal Proceedings (Wetboek Strafvordering)). The notification of criminal offences in

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71 In a judgment of 15 October 2010, the Court of Cassation has decided that the notion "at which criminal proceedings are pending" within the meaning of Article 2 of the Law of 28 April 1999 does not imply that a judicial inquiry (conducted an examining magistrate) has to be opened. As a result, the Public Prosecution's Office has (also) the obligation to inform the Minister of Finances if a criminal investigation (conducted without the involvement of an examining magistrate) has revealed indications of fraud in relation to direct and indirect taxes: Cass., 15 October 2010, www.cass.be, discussed by J. Van Dyck, "Wanneer moet Parket indiciën van belastingontduiking melden", *Fiscoloog*, No. 1227 (2010), pp. 2 - 3 (p. 2). Contra: Antwerp, 5 May 2009, unpublished, discussed by J. Van Dyck, "Wanneer moet parket Minister van Financiën inlichten", *Fiscoloog*, No. 1163 (2009) pp. 5 - 7 (p. 6) .

72 Cass. 9 December 1997, F.J.F., 1998, p. 5.

73 Article 61ter 4° of the Code on Criminal Proceedings.

74 M. Maus, *De Fiscale Controle*, (Brugge: Die Keure, 2005), p. 296, m.no. 420.

relation to tax matters, is subject to the prior authorization of the Regional Director (Article 29 § 2 of the Code on Criminal Proceedings).

Beside the obligation to notify criminal offences, the role of the Federal Public Service of Finances in criminal proceedings is limited to that of a witness *"under penalty of nullity of the criminal proceedings"*.[75] Any active involvement and co-operation of the Federal Public Service of Finances in criminal inquiries is not allowed. It is therefore generally accepted that a spontaneous or systematic transfer of information by the Federal Public Service of Finances to the Public Prosecutor's is prohibited. The courts, however, tend to interpret the role of the Federal Public Service of Finances in criminal proceedings as that of a *"passive witness"* relatively broad. In a judgment of 17 December 2008 the Court of Cassation held, for instance, that the Federal Public Service of Finances is allowed to spontaneously complete the information it had initially provided to the Public Prosecution's Office even if this results in a meaningful contribution of the Federal Public Service of Finances contributes to the criminal inquiries.[76]

## 5. Sharing information internationally

### *5.1. Conventions on the avoidance of double taxation with respect to taxes on income and capital*

#### *5.1.1. General*

Currently, Belgium has concluded a convention on the avoidance of double taxation with respect to taxes on income and capital (hereinafter: *"double taxation convention"*) with approximately 90 countries. The majority of the double taxation conventions concluded by Belgium include a provision on exchange of information similar to either Article 26 of the OECD MC **1963 or Article 26 of the OECD MC 1977.**[77] Some double taxation conventions concluded by Belgium, however, deviate from Article 26 OECD MC 1963 and 1977.

The double taxation convention concluded with Switzerland, for instance, provides that exchange of information is limited to information that is relevant for the implementation and execution of the provisions of that convention.[78] Moreover, the provisions on exchange of information included in the double taxation conventions with Kirgizia, Kuwait, Moldavia, Tadzhikistan en Turkmenistan are limited to in-

75 Article 463 BITC, Article 74bis of the VAT Code, Article 207 of the Code on Various Taxes and Levies.

76 Cass., 17 December 2008, www.cass.be.

77 See, however, infra footnote 66 et seq.

78 For a detailed discussion of the provisions on exchange of information of the double taxation convention concluded with Switzerland, reference is made to V. Dauginet en K. Lammens, "Fiscale informatie-uitwisseling tussen België en Zwitserland", *Tijdschrift voor Fiscaal Recht* , No. 317 (2007) pp. 179-188

formation with respect to significant subsequent amendments to the domestic laws of the contracting states. The double taxation conventions concluded with aforementioned states therefore do not allow the exchange of information that is solely relevant for the assessment of the taxes levied by the contracting states. Last but not least, in 2006 Belgium concluded a new double taxation convention with the United States. The scope of the provision on exchange of information included in that convention is significantly wider than Article 26 of the OECD MC 1977 and, on some points, even wider than Article 26 of the OECD MC 2010. The new convention with the United States is not only the sole convention currently in force which allows the Federal Public Service of Finances to exchange of information held by financial institutions which is (normally) subject to bank secrecy (see, however, *infra* note no. 66 *et seq.*), but also authorizes the Federal Public Service of Finances to perform tax audits in order to comply with a request for information by the Internal Revenue Service (IRS), notwithstanding the fact that the domestic statutes of limitations in that respect have already lapsed.[79]

In accordance with Article 25 OECD MC ("Mutual Agreement") Belgium has also concluded administrative agreements with 12 contracting states which implement the provisions on the exchange information in the respective double taxation conventions and, if applicable, other international instruments such as the Multinational Convention on Assistance in Tax Matters of the OECD and the Council of Europe (hereinafter: *"the Multinational Convention"*) and the Mutual Assistance Directive.[80] [81] These administrative agreements contain (among other ones) provisions in relation to the authorities competent to exchange information, the automatic transfer of certain information, simultaneous and cross-border tax examinations, etc.

As a general rule, information received by the Federal Public Service of Finances under the double taxation conventions is subject to the rules on professional secrecy discussed above. Contrary to information obtained domestically, information received under the double taxation conventions may only be used for the assessment and the collection of taxes to which those conventions are applicable. In accordance with OECD MC 1963 and 1977, the double taxation conventions con-

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79 For a more detailed discussion of the provision on exchange of information included in the (new) Belgian-US double taxation convention, reference can be made to C. Docclo, "Chapter XXV – Exchange of Information" in The New US-Belgium Double Tax Treaty, a Belgian and EU Perspective, (Brussels: Larcier, 2009), p. 537-553.

80 The states with which Belgium has concluded an administrative agreement are: Canada, Denmark, Estonia, France, Italy, Latvia, Lithuania, the Netherlands, Ukraine, Rwanda, the Czech Republic and the United States. These administrative agreements can be consulted at the website of the Administration of Fiscal Affairs, http://fiscus.fgov.be/interfafznl/nl/international/cooperation/index.htm (visited: February 19, 2013).

81 The Multinational Convention and the Mutual Assistance Directive are discussed further below in this report.

cluded by Belgium are (currently) only applicable to taxes on income and capital, i.e. the personal income tax, the corporate income, the income tax for legal entities, the income for non-residents and the additional surcharges on those taxes. Information received by the Federal Public Service of Finances cannot therefore be used for the assessment and collection of other taxes than taxes on income and capital and cannot be communicated with other government institutions such as, for instance, the social security authorities. Information received by the Federal Public Service of Finances under double conventions which contain a provision similar to Article 26 of the OECD MC 1977 can, however, also be used for the prosecution of criminal offences in relation to income taxes and, as a result, may be communicated to the Public Prosecutor's office for that purpose.[82]

From a report of the National Auditors Department it can be derived that the Federal Public Service of Finances exchanges information regularly and efficiently with adjacent states with which it has concluded an administrative agreement (see *supra* note no. 62) such as France and the Netherlands. Exchange of information with other states, including adjacent states such as Germany and Luxembourg, works less efficiently due to the absence of an administrative agreement with those countries (cf. Article 25 of the OECD MC).[83]

### *5.1.2. Recent development in relation to bank secrecy*

In accordance with Article 26 of the OECD MC 1963 and 1977, the double taxation conventions concluded by Belgium provide that a contracting state is not obliged to exchange information which is not obtainable under its domestic law and its administrative practice. Having regard to the domestic rules on bank secrecy (as applicable before the amendments thereto in 2011 discussed below), the Federal Public Service of Finances, until recently, did not exchange information held by financial institutions under its double taxation conventions (or other international instruments). Consequently, Belgium did not comply with the OECD standard on exchange of tax information as developed by the Global Forum.[84] The OECD therefore decided in 2009 to place Belgium on the "grey list" of tax havens unless Belgium concluded at least 12 double taxation conventions which provide for the exchange of information held by (Belgian) banks and other financial institutions.

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82 That information cannot, however, be used for the prosecution of criminal offences not related to income taxes: see Ghent, 13 January 2004, Fisk. Koer., 2004, p. 380

83 Report of on the international cooperation in tax matters of the National Auditors Department to the Chamber of Representatives (February 2011), p. 65, to be consulted at https://www.ccrek.be/NL/Publicaties/Fiche.html?id=674b0e99-6d5e-4432-b3fb-eedde4555146 (visited: 19 February 2009).

84 For more information on this standard and the work of the global forum in that respect: http://www.oecd.org/site/0,3407,en_21571361_43854757_1_1_1_1_1,00.html .

The inclusion of Belgium on the OECD's "grey list" of tax havens did not go unnoticed. In 2009 and 2010 Belgium concluded a protocol with approximately 40 of its treaty partners containing a provision on exchange of information in line with the most recent version of Article 26 of the OECD MC and more in particular paragraph 5 thereof, which provides that a contracting state (Belgium) is in no case permitted to decline to supply information solely because the information is held by a bank or another financial institution.[85] [86] Having regard to the changed treaty policy of Belgium, the OECD decided to remove Belgium from its grey list in the autumn of 2009.[87]

Even after three years, these protocols have not been ratified and entered into force. The reason for this is that the Council of State has decided that these protocols not only have to be ratified by the federal parliament but also by the (five!) Regional and Communal parliaments.[88] Exchange of information held by banks and other financial institutions therefore remained inoperative in practice. Being exposed to a serious risk to be once again included on the "grey list" of tax havens of the OECD during the second phase of the peer review process by the Global Forum, Belgium has decided in 2011 to introduce provisions in its domestic law which allow the Federal Public Service of Finances, pending the ratification of aforementioned protocols, to exchange information held by banks and other financial institutions with its treaty partners.[89] [90] New Article 322 (4) BITC provides in that respect that a request for information under the provisions of a double taxation convention, a TIEA, the Mutual Assistance Directive, the Multinational Convention is deemed to be an indication of tax fraud or higher prosperity with the result that that request authorizes the Federal Public Service of Finances to perform inquiries at a bank or a financial institutions. As opposed to the provisions on bank secrecy applicable in a domestic situation discussed above, the Federal Public Service of Finances can directly perform inquiries at the bank or financial institution without being obliged to (i) send a prior request for information to the taxpayer in-

85 A list of all the protocols concluded by Belgium can be consulted at the website of the Administration of Fiscal Affairs http://fiscus.fgov.be/interfafznl/nl/site/contact.htm. See also: A. Van De Vijver, "Verdragsbevoegdheid van de gemeenschappen en de gewesten", *Tijdschrift voor Fiscaal Recht*, No. 410 (2011), pp. 847 -850.

86 In accordance with Article 26 of the OECD MC 2010, exchange of information under the protocols concluded by Belgium is also no longer restricted to taxes on income and capital, but extends to taxes of every kind.

87 J. Devos, "België geschrapt van grijze lijst", *Fiscale Actualiteit*, No. 35 (2009), pp. 8-10.

88 For a more detailed discussion of this issue, reference is made to A. Van De Vijver, "Verdragsbevoegdheid van de gemeenschappen en de gewesten", *Tijdschrift voor Fiscaal Recht*, No. 410 (2011), pp. 847- 850.

89 Law containing various measures of 14 April 2011, S.G. 6 May 2011.

90 The Belgian legislator also seized the opportunity to amend the provisions on bank secrecy applicable in a domestic setting (see supra footnote 30 et seq.)

volved and (ii) to send a notification to that taxpayer that inquiries at the bank or financial institution are being made.

### *5.2. Tax Exchange Information Agreements*

Pursuant to the inclusion of Belgium on the "grey list" of tax havens of the OECD, Belgium also concluded in 2009 and 2010 a Tax Exchange Information Agreement (hereinafter: *"TIEA"*) with Andorra, Anguilla, Antigua, Barbuda, Bahamas, Belize, Dominica, Gibraltar, Grenada, Liechtenstein, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and Grenadines.[91] These TIEAs (chiefly) follow the text of the (bilateral) TIEA Model issued by the OECD and contain a provision similar to Article 5 of that model which provides that each contracting state must ensure that its competent authorities have the authority to obtain and provide upon request, information held by banks and other financial institutions. Since the scope of (some) TIEAs is not restricted to taxes on income and capital but extends to other (regional) taxes, the Council of State has decided that these TIEAs not only have to be ratified by the federal parliament but also by the Regional and Communal parliaments (see *supra* note no. 67). At present, the TIEAs concluded by Belgium have not yet been ratified and entered into force.

### *5.3. Mutual Convention on Assistance in Tax Matters*

Belgium has signed and ratified the Multinational Convention.[92] On 4 April 2011 Belgium also signed the Protocol of 27 May 2010 amending the provisions of the Multinational Convention. Article V of this protocol provides that a contracting state is not permitted to decline to supply information solely because the information is held by a bank or another financial institution (*cf.* Article 26 paragraph 5 of the OECD MC 2010). At present, this protocol has not yet been ratified and entered into force. In addition to Belgium, only the Netherlands, Poland, France, the United Kingdom, Denmark, Finland, Norway, Sweden, India, Georgia, Iceland, Spain, Ukraine, Italy, the United States and Azerbaijan have ratified the Multinational Convention.[93]

As a general rule, the Multinational Convention applies to taxes of every kind and social security contributions (cf. Article 2 of the Multinational Convention). The contracting states are, however, free to limit the scope of the Multinational

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91 The TIEAs can be consulted at the website of the administration of Fiscal Affairs: http://fiscus.fgov.be/interfafznl/nl/site/contact.htm (visited: 19 February 2009).

92 Law of 24 June 2000 containing the ratification of the Multinational Convention on the Assistance in Tax Matters, S.G. of 14 October 2002. This law entered into force as from 1 December 2000.

93 A list of the countries which have ratified the Multinational Convention can be consulted at www.ibfd.org.

Convention by making reservations to one or more categories of taxes (*cf.* Article 30 of the Multination Convention). According to the Law of 24 June 2000 on the ratification of the Multinational Convention, the Multinational Convention is, from a Belgian perspective, only applicable to income taxes, VAT and registration duties on donations, succession duties and the annual tax on profit participation.[94] The other states which have ratified the Multinational Convention have also made several reservations thereto in order to limit its theoretically wide scope.[95] These reservations not only limit the obligation to exchange information under the Multinational Convention, but also affect the use that the receiving state is allowed to make of that information (*cf.* Article 22 of the Multinational Convention).

The limited number of countries which have ratified the Multinational Convention and the reservations made by those countries seriously hampers the efficiency of exchange (and the use) of information under that convention and raises questions on the added value thereof compared to other international instruments on exchange of information. For this reason, the Federal Public Service of Finances only rarely exchanges and receives information under the Multinational Convention [96] but rather prefers to exchange information under other international instruments.

### *5.4. Mutual Assistance Directive*

As a European Union Member State, Belgium is also authorized (and obliged) to exchange information under Directive 77/799/EEC of 19 December 1997 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (hereinafter: *"Mutual Assistance Directive"*). The Mutual Assistance Directive has been implemented in Article 338 BITC, which is an almost identical copy of the relevant provisions of the Mutual Assistance Directive. Belgium has concluded administrative agreements implementing the provisions of the Mutual Assistance Directive, with several European Union Member States (*supra* note no. 62).

Unlike information obtained domestically, information obtained under the Mutual Assistance Directive can, as a general rule, only be used for the assessment of taxes to which the Mutual Assistance Directive applies (i.e. income taxes) unless the other Member State authorizes Belgium to use that information for other purposes (*cf.* Article 7 of the Mutual Assistance Directive). Informal contacts with the

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94 See attachment A to the treaty, S.G., 17 October 2000; Circular nr. AFZ/2000-237 of 20 August 2001, Bull. Bel., 2001., No. 819, p. 1997, www.fisconet.fgov.be.

95 For the content of the reservations made by the countries that have ratified the Multinational Convention, reference is made to http://conventions.coe.int.

96 L. De Broe, D. Pieters, P. Schoukens, D. Van Bortel, *Opvraging, aanwending en uitwisseling van gegevens (nationaal en internationaal) op vlak van fiscaliteit, sociale zekerheid en justitie door de FOD's Financiën, Justitie, Arbeid en Sociale Zekerheid*,(Leuven:KULeuven, 2010), p. 58.

Federal Public Service of Finances have indicated that, if the tax file of the taxpayer is recorded on paper, information received under the Mutual Assistance Directive is recorded in separate file entitled "information received from abroad". When other government institutions (e.g. the Public Prosecutor's Office) request access to that file, the Federal Public Service of Finances requests the other Member State, on a case-by-case basis, for the authorization to use the information included therein for other purposes than the assessment of income taxes.[97]

From a report of the National Auditors Department (*supra* note no. 65) it can be derived that the Federal Public Service of Finances exchanges information regularly and efficiently with adjacent Member States, such as France and the Netherlands, with which it has concluded an administrative agreement. Exchange of information with other Member States, including adjacent states such as Germany and Luxembourg works less efficiently due to the absence of an administrative agreement with the those countries.[98]

Informal contacts with the Federal Public Service of Finances have also indicated that the tax officers often hesitate to request information under the Mutual Assistance Directive due to the time-consuming nature of such a request.[99]

The Mutual Assistance Directive has recently been replaced by Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation. The scope of Directive 2011/16/EU is significantly wider than the Mutual Assistance Directive both with respect to obligation to exchange of information and to the use of that information in the receiving state. At present, the Belgian legislator has not yet implemented Directive 2011/16/EU and amended Article 338 BITC in order to bring it in line with that directive.

### *5.5. Savings Directive*

Belgium has implemented the provisions of Council Directive 2003/48/EC of 3 June 2003 on the taxation of savings income in the form of interest payments (hereinafter: *"Savings Directive"*) in Article 338bis BITC. Like Austria and Luxembourg, Belgium, until 31 December 2009, did not automatically exchange infor-

97 L. De Broe, D. Pieters, P. Schoukens, D. Van Bortel, *Opvraging, aanwending en uitwisseling van gegevens (nationaal en internationaal) op vlak van fiscaliteit, sociale zekerheid en justitie door de FOD's Financiën, Justitie, Arbeid en Sociale Zekerheid,* (Leuven: KULeuven, 2010), p. 55.

98 Report of on the international cooperation in tax matters of the National Auditors Department to the Chamber of Representatives (February 2011), p. 65, to be consulted at https://www.ccrek.be/NL/Publicaties/Fiche.html?id=674b0e99-6d5e-4432-b3fb-eedde4555146 (visited: 19 February 2009)

99 L..De Broe, D. Pieters, P. Schoukens, D. Van Bortel, *Opvraging, aanwending en uitwisseling van gegevens (nationaal en internationaal) op vlak van fiscaliteit, sociale zekerheid en justitie door de FOD's Financiën, Justitie, Arbeid en Sociale Zekerheid,* (Leuven: KULeuven, 2010), p. 51

mation under the Savings Directive, but levied a withholding tax instead (*cf.* Articles 10 and 11 of the Savings Directive).

As from 1 January 2010, Belgium has ceased to levy a withholding tax and automatically exchanges information on savings income with other EU Member States (or states with which a 'Savings Agreement' has been concluded).[100]

From an answer to a parliamentary question of 16 January 2011, it can be derived that with respect to 2009 and 2010 the Federal Public Service of Finances has chiefly received information under the Savings Directive from adjacent states, such as France (51,206 times) and the Netherlands (93,990 times) and that only little information was received from East European countries such as Estonia (142), Bulgaria (575) and Latvia (60).[101] A report of the National Auditors Department also indicates that information received under the Savings Directive has led to a significant amount of additional tax assessments in recent years.[102]

### *5.6. Other*

Belgium also exchanges information with respect to indirect taxes on the basis of the following international instruments:

- Council Regulation 904/2010 on the administrative cooperation and the combating of fraud in the field value added tax and Regulation 79/2012 of 31 January 2012 laying down detailed rules for implementing certain provisions of Council Regulation 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax.
- The Convention between Belgium and France on the avoidance of double taxation with respect to inheritance taxes and registration duties of 20 January 1959.[103]
- The Convention between Belgium and Sweden on the avoidance of double taxation with respect to inheritance taxes of 18 January 1956.[104]
- The Benelux Convention of 29 April 1969 on administrative and criminal cooperation in the field of regulations relating to the objectives of Bene-

100 X, "Europese Spaarrichtlijn", *Internationale Fiscale Actualiteit*, No. 2 (2010) , p. 4. [

101 Parliamentary Question no. 103 of 16 January 2012 of Van Der Maelen, www.monkey.be

102 Report of on the international cooperation in tax matters of the National Auditors Department to the Chamber of Representatives (February 2011), p. 60, to be consulted at.https://www.ccrek.be/NL/Publicaties/Fiche.html?id=674b0e99-6d5e-4432-b3fb-eedde4555146 (visited: 19 February 2009)

103 Law of 20 April 1960 on the ratification of the convention between France and Belgium on the avoidance of double taxation and related issues with respect to inheritance taxes and related issues, S.G. 10 June 1960.

104 Law of 28 February 1958 on the ratification of the convention between Belgium and Sweden on the avoidance of double taxation and relates issues with respect to inheritance taxes and protocol thereto signed on 18 January 1956 in Stockholm, S.G. 5 April 1958.

lux union.[105] [Benelux Convention on Administrative and Criminal Co-operation in matters related to the aims of the Benelux Economic Union]

### *5.7. Concluding remarks*

The tax authorities are only allowed to exchange information with other countries on the basis of international agreements and other international instruments (European regulations and directives). In the event that these agreements and instruments are not applicable, the tax authorities are not allowed to share information with and receive information from foreign tax authorities.

Belgian domestic law does not impose any restrictions on exchange of information other than those included in the international agreements and instruments. There is equally no provision in domestic law that prohibits the Federal Public Service of Finances to exchange information if there is no guarantee that the same secrecy is upheld in the other contracting state. Obviously, the Federal Public Service of Finances may, however, refuse to exchange information on the basis of the grounds included in the respective international instruments, e.g. if that information is not obtainable under the domestic law of administrative practice of the requesting state or if that information would disclose a trade secret. In this respect, reference can be made to an interesting judgment of 5 September 1980 in which the court of first instance of Brussels decided that Federal Public Service of Finances had to pay compensation for the damages it had inflicted on the taxpayer at the occasion of the exchange of information to the Italian tax authorities which had a revealed a trade secret.[106]

## 6. Access to taxpayer's data by the public

### *6.1. Confidentiality of tax files – Professional secrecy of tax officials*

As mentioned above, information obtained by a tax officer in the pursuit of his mandate is subject to professional secrecy. The professional secrecy concerns not only the tax data as such, but all matters of which a tax official has knowledge when exercising his function, even if this information e.g. is merely circumstantial or of a mere statistical nature[107]. However, all information that is to be considered

105 S.G. 17 February 1971.

106 Court of First Instance of Brussels, 5 September 1980, unpublished, discussed in *Fiscoloog Internationaa*l, No. 35(1986) , pp. 1-2.

107 Cass. 14 September 1999, Pas., 1999, I, p. 1146.

common knowledge is excluded[108]. The violation of professional secrecy by a tax official is a criminal offence[109].

As a result, the tax files of all taxpayers are considered confidential and a taxpayer's tax returns, his correspondence or agreements with the tax administration, or any other elements of the tax file such as e.g. data collected by the administration or the outcome of a tax audit are not and may not made public in any way. The Belgian tax administration, for the same reason, does not make public lists of taxpayers and their income and will not grant access to the tax file of an individual taxpayer, nor will it provide information in any other way to any third party, save for the cases discussed above.

One notable exception to the above is expressly provided in the Belgian Inheritance Tax Code (Wetboek Successierechten)[110], which provides that, under certain conditions, a third party may obtain an extract or a copy of an inheritance tax declaration. The third party needs to petition the justice of the peace and must set forth its legitimate and rightful interest in obtaining the information in order to obtain authorization to get the information. The analysis made by the justice of the peace is twofold: firstly, whether the claim is admissible, i.e. whether the person indeed has a legitimate and rightful interest in the information and secondly, whether the request is well-founded, i.e. whether that legitimate and rightful interest outweighs the right to privacy of the deceased and his/her heirs[111].

### *6.2. Tax Rulings*

Taxpayers can obtain advance rulings in tax matters from the Belgian Ruling Commission. Before making an official rulings request the taxpayer may request a 'pre-filing' meeting at which the positions of the taxpayer and the Rulings Commission can be compared. The main advantage of this 'pre-filing' is that this can take place anonymously. Based on the outcome of the 'pre-filing', the taxpayer can decide whether to proceed with an official rulings request with full disclosure or to withdraw his request[112].

Rulings issued by the Rulings Commission are published on an anonymous basis and with respect for the rules of professional secrecy[113]. The publications consist of a summary containing the request, the facts, the considerations and the ex-

108 Court of Appeal Brussels, 25 May 2000, R.G. No. 1993/FR/362, consulted at www.fiscalnet.be.

109 Article 453 BITC, with a direct reference to Article 458 of the Criminal Code.

110 Article 143 of the Belgian Code of Succession.

111 E. Alofs, S. Gutwirth, *Inlichtingen te verstrekken (aan derden) door de ontvangers der registratie- en successierechten: het recht op informatie versus het recht op privacy*, *Notarieel Fiscaal Maandblad*, No. 2 (2007) pp. 37 - 50 .

112 E. Warson, *Invulling en precedentswaarde van rulings*, (Gent: Larcier, 2010), p. 8.

113 Article 24 of the Law of 24 December 2002, S.G., 31 December 2002.

tensive motivation of the decision by the Rulings Commission. Publication of the rulings is aimed at increasing legal certainty and transparency, while at the same time respecting the taxpayer's right to privacy and the tax administration's obligations with respect to professional secrecy.

### *6.3. Decisions of tax courts*

Decisions of tax courts are published via various channels. First of all, although there is no formal obligation for the Belgian State to publish the decisions of the various Belgian courts[114], the government has traditionally secured publication of the decisions of the Supreme Court, which includes tax cases. In the wake of the modernization and computerization of justice (the 2005 Phoenix project[115]) among other things a government database was created with an external feature, which would allow the publication of court decisions. However, the number of cases published via this database remains low relative to the total output of case law. The Belgian tax administration also publishes court decisions which it finds relevant on its website (www.fisconet.be). Despite the above, the majority of tax cases remain unpublished, which is a gap private publishers attempt to fill via various specialized tax publications containing tax case law overviews, summaries, and full text decisions in tax cases.

All court decisions published by the Belgian government via its databases, including those of the tax administration, take places only on an anonymous basis, i.e. by removing all references to the identity of the taxpayer(s)[116]. As such, the legislator has followed the recommendations of the Privacy Commission in this respect, which stated that it feared that various features of online accessible databases, including powerful search engines, would allow name-driven search requests and would as such allow the gathering of substantial information on certain taxpayers to be made possible[117]. Nevertheless, court decisions published in journals are not always edited and can still contain references to the identity of the taxpayer.

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114 Article 149 of the Constitution merely requires that judgments are to be pronounced publicly.

115 Law of 10 August 2005 (Phoenix Law), S.G., 1 September 2005.

116 Article 9 of the Law of 10 August 2005, S.G., 1 September 2005.

117 Privacy Commission: Advice 07/96 of 22 April 1996 and Advice 42/97 of 23 December 1997. The Privacy Commission has restated that concern specifically in the context of the Phoenix Project in Advice11/2004 of 4 October 2004 to be consulted on the website of the Privacy Commission: http://www.privacycommission.be.

### *6.4. Protection of journalist sources in the tax administration and the tax courts*

Journalist sources are explicitly protected by law. The definition of a journalist source is quite wide and covers everyone who provides a direct contribution to the collection, drafting, production or the disbursement of information for the public via a medium[118].

However, the law regarding the protection of journalist sources does not prevent, or prohibit, criminal investigations against a person who has violated professional secrecy rules, which, as stated above, is a criminal offence. According to the Supreme Court, the protection of journalist sources serves to protect the exchange between the journalist and his sources and prevents that journalists could be forced to reveal a source. However, according to the Supreme Court, the legislation does not aim at protecting those persons who, by divulging certain information, commit a criminal offence. In the wording of the Supreme Court: "*La qualité de celui qui reçoit l'information dont la divulgation est un délit n'immunise pas l'auteur de cette divulgation*"[119].

## 7. Access to taxpayers' data by individuals

From a Belgian law perspective no distinction is made between access to tax data by the general public or one specific individual within the public.

## 8. Consequences of infringements

*Case 1*

John A is an employee at the national tax authority. One day, John is reviewing the tax declaration of Steven B, sole proprietor of a locally very popular furniture store, Smiling Homes. John discovers that Smiling Homes during 2010 has bought furniture from non-European companies known for their intense usage of child labour. John decides to reveal this information to a local newspaper by sending a copy of Steven's tax declaration (or a copy of both Steven's and Smiling Homes' declaration, if those are kept separate in your legal system). The newspaper publishes a series of articles on Steven B's lack of social sensitivity. Steven, in the year following the revelations, experiences a sharp decrease in sales, estimated in 500.000 Euros. Moreover, Steven and his family are regularly harassed by activists picketing in front of their home.

*a) Is John, in your legal system, subject to criminal prosecution?*

118 Article 2 of the Law of 7 April 2005 for the protection of journalist sources, S.G. 27 April 2005.

119 Cass., 6 February 2008 to be consulted on www.juridat.be (visited: February 19, 2013).

Yes, John is subject to criminal prosecution, since information obtained by a tax officer in the pursuit of his mandate is subject to professional secrecy, the breach of which is a criminal offense.

*b) Does Steven have a civil claim against John or the tax authority? If so, is Steven entitled to compensation for monetary loss?*

Yes, Steven can lodge a civil claim for damages.

*c) Is Steven entitled to compensation for loss of reputation and disturbances to his private life? If so, how are the damages quantified?*

Under civil law, in principle, damages is to be understood in the broadest sense, including but not limited to, economic, material and moral-emotional damages. For quantification see d).

*d) How can Steven prove in court that the drop in furniture sales is due to the bad transparency and not due to normal market fluctuations? Who has the burden of proof? Does it follow ordinary civil proceedings? Can Steven successfully employ probability arguments?*

The burden of proof with respect to the existence of damages, the amount and nature thereof lies with the claimant, who will have to prove a causal link between the infraction of the professional secrecy rules and the damages suffered.

*e) Would the answers to questions a), b) and c) be different if John had published the information on Smiling Homes on his Facebook page or on a blog?*

No, the method used for divulging confidential information is irrelevant.

*f) Would the answers to questions a), b) and c) be different if John had revealed the information about Smiling Homes to news media, but without giving away a copy of the tax declaration?*

No, professional secrecy not only concerns tax data, but all information a tax official derives within the context of his function.

*Case 2*

Carl C is an employee of the national tax authority. On Monday 1 June 2011, Carl receives a call from a police officer demanding that he send overall tax documentation pertaining to Sandra D. The officer explains that Sandra D is suspected of collaboration with terrorists. The requested tax documentation may help the police to understand Sandra's economic movements and her business connections. Of interest is also that the terrorist group to which Sandra may be connected to is, according to intelligence information, planning an attack against a political target. Carl complies with the police officer's request. After a few months, however, it becomes clear that Sandra D is not connected to a terrorist group and that all her business transactions are conducted with re-

spectable persons. In particular, Sandra works as a translator from English to Arabic. Many of Sandra's clients, however, decide to abandon her after having been contacted by the police during the investigation.

*a) Has Carl C committed a crime by handing over Sandra's tax documentation to the police officer?*

Yes, also this sharing of information qualifies as a criminal offence. The sharing of information is only allowed in the cases strictly provided for by law, including sharing of information within the Federal Public Service of Finances or internationally with other tax administration, or with the Public Prosecution office. The latter is to be interpreted strictly and therefore does not include the sharing information with a police officer.

*b) Is Sandra entitled to compensation for loss of her future income and/or reputation from Carl C or the tax authority?*

Yes, Sandra can claim for damages under civil law. For the proof and quantification see b), c) & d) under Case 1.

*c) Would the answers to questions a) and b) be different if Sandra has been suspected of something less dramatic than being connected to a terrorist group, like, for instance, a white-collar crime?*

No.

*Case 3*

Amanda F is an employee at Pecunia Bank located in Country A. On 3 May 2011, she is approached by a person, Henry G, claiming to be an agent of Country B's intelligent service, who is interested in buying a memory stick containing information on all the bank's account holders. Henry G claims that several citizens of Country B uses Pecunia Bank's accounts to screen their tax evasion and that the government of Country B hopes to recover hundreds of millions of Euros in taxes. Country B's government is therefore willing to pay Amanda F ten million Euros for her services. Amanda agrees, downloads all the required information on a memory stick that she then gives to Henry G. The information is then provided to Country B's tax authority.

*With respect to country A*

*a) Has Amanda F committed a criminal offence?*

No, bank employees are only subject to professional discretion rules, the breach of which is not (unlike e.g. for lawyers or tax officials) a criminal offense.

*b) Are the account holders whose tax evasion has been discovered entitled to recover their monetary loss from either Amanda F or Pecunia Bank?*

Yes, a civil claim for damages could be lodged. For the proof and quantification of the monetary loss see b), c) & d) under Case 1.

*c) Are the account holders who were not evading taxes entitled to compensation for the mere fact that their account information has been leaked? If so, how is the damage quantified?*

Yes, although in this case there seems to be no monetary loss, there could still be a case for moral damages for which compensation may be claimed, although the proof and quantification thereof is likely to be more difficult.

*With respect to country B*

*a) Can the tax authority use the information acquired by bribing a bank employee to recover evaded taxes?*

There is no specific regulation in tax law with respect to the use of stolen data (sanctions tend to be limited to the breach of certain procedural rules). Nevertheless, case law tends in principle to reject the use by the tax administration of illegally obtained information for the assessment of taxes.

A recent criminal case - where similar to tax la there is no general rule dealing with the use of illegally obtained information - tends to restrict the exclusion of illegally obtained information to cases where the reliability of the information cannot be assured or the use of that information would lead to be breach of the principle of a fair trial. Currently, it is still debated whether this criminal case law is to be applied in tax matters as well.

Case law exists in tax matters with respect facts similar to the case at hand (*KB-Lux* cases), where tax courts decided that to the extent that the tax administration had validly, i.e. with respect of procedure, acquired information from a criminal file, could use that information to levy taxes, notwithstanding the fact that such information concerned stolen data. This case law is, however, severely criticized among legal scholars. Further case is to be expected (if the pending HSBC investigations result in tax assessments and criminal prosecution).